NO. 46618-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

TODD ANTHONY BUURMAN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01284-5

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

A. ANSWERS TO ASSIGNMENTS OF ERROR

I. THE UNWITTING POSSESSION INSTRUCTION DID NOT VIOLATE MR. BUURMAN'S RIGHT TO DUE PROCESS AND IF THERE WAS ERROR, REVIEW IS PRECLUDED BECAUSE MR. BUURMAN INVITED THE ERROR BY PROPOSING THE INSTRUCTION.

II. THE COURT DID NOT ERR BY GIVING THE UNWITTING POSSESSION INSTRUCTION AND IF IT DID ERR, REVIEW IS PRECLUDED BECAUSE MR. BUURMAN INVITED THE ERROR BY PROPOSING THE INSTRUCTION.

III. MR. BUURMAN'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE BURDEN TO PROVE UNWITTING POSSESSION WAS PLACED ON HIM.

IV. MR. BUURMAN'S FELONY CONVICTION DID NOT VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

V. RCW 69.50.4013 DOES NOT VIOLATE DUE PROCESS.

VI. MR. BUURMAN'S THEFT CONVICTION DID NOT VIOLATE HIS RIGHT TO AN ADEQUATE CHARGING DOCUMENT.

VII. MR. BUURMAN'S THEFT CONVICTION DID NOT VIOLATE HIS RIGHT TO AN ADEQUATE CHARGING DOCUMENT.

VIII. THE CHARGING DOCUMENT DID NOT FAIL TO ALLEGE CRITICAL FACTS IDENTIFYING THE THEFT CHARGE.

IX. THE STATE CONCEDES THAT THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY BY ORDERING MR. BUURMAN TO PAY THE VICTIM PENALTY ASSESSMENT TWICE.

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Todd Buurman was charged by information with Possession of a Controlled Substance – Methamphetamine and Theft in the Third Degree based on an incident on or about June 30, 2014. CP 1. The case proceeded to trial before The Honorable Scott Collier which commenced on August 11, 2014, and concluded on August 12, 2014, with the jury's verdict. RP 6-165.

The jury found Mr. Buurman guilty as charged, and the trial court sentenced him to a standard range sentence of seven months. RP 164-66, 176-77; CP 59-82. Mr. Buurman filed a timely notice of appeal. CP 86-87.

II. STATEMENT OF FACTS

On the night of June 30, 2014, Mr. Buurman was observed by a Safeway employee leaving a Safeway store in Clark County, Washington, without paying for the merchandise in his possession. RP 56-59, 120. The items stolen included steak, milk, cat food, Coca-Cola, and alcoholic

beverages. RP 65, 116-17. The police were called and ended up contacting Mr. Buurman just down the street from the Safeway store. RP 66.

Upon contact, and after reading Mr. Buurman his *Miranda* warnings, Mr. Buurman admitted to the theft. RP 67, 78, 117. Mr. Buurman told the police that he did not have the money to pay for the items and that he had taken the items for his personal use. RP 67-68. The police officer handcuffed and then searched Mr. Buurman incident to the arrest and discovered a baggie containing methamphetamine in Mr. Buurman's shorts. RP 68-69, 89. When confronted about the baggie of methamphetamine, Mr. Buurman admitted the shorts that he was wearing were his, but denied knowing that the baggie was in his shorts and did not know what the baggie contained. RP 72-73, 78.

Mr. Buurman testified and, after admitting to having been convicted of eight crimes of dishonesty[1], explained that on June 30, 2014, at about noon, he picked up the shorts he was wearing from a pile of dirty clothes and thought he had checked every pocket thoroughly by putting his hand in each of them. RP 114-16, 120, 122. He admitted he stole the items he was accused of stealing. RP 116-17, 119. Mr. Buurman also

[1] Taking a Motor Vehicle – 2007, Shoplifting – 2007, Theft in the Second Degree and Identity Theft in the Second Degree – 2008, Theft in the Second Degree – 2009, Theft in the Third Degree – 2010, Attempted Burglary in the Second Degree – 2011, and Shoplifting – 2013.

testified that at the time of the theft he did not know that there was methamphetamine in his shorts' pocket. RP 118, 122.

C. ARGUMENT

I. ANY POTENTIAL ERROR ASSOCIATED WITH THE UNWITTING POSSESSION DEFENSE WAS INVITED BY MR. BUURMAN WHO PROPOSED THE UNWITTING POSSESSION JURY INSTRUCTION, BUT, NONETHELESS, THE DEFENDANT'S BURDEN TO PROVE UNWITTING POSSESSION DEFENSE DOES NOT OFFEND DUE PROCESS.

a. Invited Error

When an instruction given is one defense counsel proposed, the invited error doctrine prevents reviewing courts from reversing the conviction based on an error in that jury instruction. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Studd*, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Mercado*, 181 Wn.App 624, 630, 326 P.3d 154 (2014) (citing *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996)). Even where constitutional rights are involved, reviewing courts are "precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn.App. 75, 89, 107 P.3d 141 (2005). The State bears the burden of proving that

defendant invited error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Here, Mr. Buurman proposed the unwitting possession instruction to the trial court. RP 123-24, 126; CP 12; WPIC 52.01. The State objected, but the trial court gave the instruction. RP 124, 138; CP 54. The instruction is as follows:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 12, 54; WPIC 52.01.

Mr. Buurman now complains that the giving of the unwitting possession instruction violated his right to due process, but because he proposed the instruction, he invited the error of which he complains and review of said error is precluded.

b. Unwitting Possession

In a prosecution for simple possession of a controlled substance there is no intent requirement. *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d

824 (1994). "The State need not prove either knowledge or intent to possess." *Id.* (citing *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994)). Consequently, "[a]side from the unwitting possession defense, possession is a strict liability crime." *Id.* (citation omitted). Thus, the State must only prove two elements: "the nature of the substance and the fact of possession by the defendant." *Staley*, 123 Wn.2d at 798. This area of the law is well-settled. *See State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) (holding that the mere possession statute does not contain a mens rea element); *State v. Bradshaw*, 152 Wn.2d 528, 534, 98 P.3d 1190 (2004) (refusing to overrule *Cleppe* and noting that in the 22 years "[s]ince *Cleppe* the legislature has amended [the drug possession statute] seven times and has not added a mens rea element"). Part of the well-settled law in this area is that the affirmative defense of unwitting possession does not improperly shift the burden of proof to the defendant. *Bradshaw*, 152 Wn.2d at 537-38; *State v. Deer*, 175 Wn.2d 725, 735-36, 287 P.3d 539 (2012) (The burden of proving unwitting possession "properly falls on the defendant because *unwitting possession does not negate the fact of possession*. Rather, as this court explained, this affirmative defense ameliorates the harshness of a strict liability crime.) (quotation and citation omitted) (emphasis added).

State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014), on which Mr. Buurman heavily relies, does not change the calculus. Rather, *W.R., Jr.*, bolsters the argument the legislature may allocate the burden of proving unwitting possession on a defendant without offending due process because, "[d]ue process does not require the State to disprove every possible fact that would mitigate or excuse the defendant's culpability," which is exactly the role of the unwitting possession defense. 181 Wn.2d at 762; *State v. Balzer*, 91 Wn.App. 44, 67, 954 P.2d 931 (1998) ("Unwitting possession is a judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute."). More specifically, *W.R., Jr.*, does not alter *Bradshaw* or *Deer*[2] wherein our Supreme Court stated that "unwitting possession does not negate the fact of possession." 175 Wn.2d at 735. Consequently, Mr. Buurman's due process rights were not violated when he proposed the defense of unwitting possession and inherited its concomitant burden to prove the defense by a preponderance of evidence.

[2] While *Deer* involved the charge of Rape of a Child in the Third Degree, it analyzed defenses to strict liability crimes and analogized the defense at issue in that case to unwitting possession. 175 Wn.2d at 731-740.

II. RCW 69.50.4013 IS NOT UNCONSTITUTIONAL AS APPLIED TO MR. BUURMAN BECAUSE HE DID NOT RECEIVE A SENTENCE THAT VIOLATED THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT NOR DID THE STATUTE PREVENT HIM FROM RECEIVING DUE PROCESS.

Courts presume that statutes are constitutional; a party challenging a "statute' s constitutionality bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P. 3d 762, 27 P. 3d 608 (2001); *State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012).

a. The Eighth Amendment

The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. *Miller v. Alabama*, --- U.S. ----, 132 S.Ct. 2455, 2463, 183 L.Ed.2d 407 (2012) (citation and quotation omitted). The Eighth Amendment right is derived from the "'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Id.* (quoting Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). "[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure," reviewing courts are to presume its validity. *State v. Smith*, 93 Wn.2d 329, 341, 610 P.2d 869 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 175,

96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976)). Moreover, a reviewing court cannot strike down a punishment or penalty because it believes that there are less severe penalties that are "adequate to serve the ends of penology." *Id.*

A punishment that is grossly disproportionate violates the Eighth Amendment; however, a punishment is "grossly disproportionate only if the conduct should never be proscribed . . . or if the punishment is clearly arbitrary and shocking to the sense of justice." *Id.* at 344-45 (citing cases). Under this rubric, the United States Supreme Court upheld a mandatory sentence of life without the possibility of parole on a first strike drug offense where the defendant possessed more than 650 grams of cocaine. *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). *Harmelin* caused one commentator to note: "[i]f the imposition of a life sentence for first-offense drug possession is consistent with the Eighth Amendment, no prison sentence short of life can be deemed disproportionate for any offense, and even a life sentence cannot be considered constitutionally unsound for any arguably serious crime." *State v. Morin*, 100 Wn.App. 25, 29, 995 P.2d 113 (2000) (quoting The Supreme Court—Leading Cases, 1990 Term, 105 HARV. L.REV. 177, 2522 (1991)). Thus, it is no surprise that in *State v. Smith* when a defendant complained that his sentence for possession of over 40 grams of

marijuana violated the Eighth Amendment because of its classification as a felony offense, our Supreme Court responded that it was "shown no authority for the proposition that classification of a person's offense, or the disabilities attached to that classification can, without more, constitute cruel and unusual punishment," and denied his Eighth Amendment claim. 93 Wn.2d. at 342.

Here, as in *Smith*, Mr. Buurman does not claim his *actual* sentence of 210 days of confinement is cruel and unusual, but rather that his crime should not be punished as a felony with its attendant disadvantages. Br. of App. 9-12. But, also like the defendant in *Smith*, *Mr. Buurman* fails to provide any authority "for the proposition that classification of a person's offense, or the disabilities attached to that classification can, without more, constitute cruel and unusual punishment." 93 Wn.2d. at 342. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); *State v. Dow*, 162 Wn.App. 324, 331, 253 P.3d 476 (2011). An appellate court need not consider issues unsupported by citation to authority. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). Consequently, Mr. Buurman's Eighth Amendment claim fails.

b. Due Process

As mentioned above, in a prosecution for simple possession of a controlled substance there is no intent requirement. *Vike*, 125 Wn.2d at 412. "The State need not prove either knowledge or intent to possess." *Id.* (citing *Staley*, 123 Wn.2d 794). Consequently, "possession is a strict liability crime." *Id.* (citation omitted). Thus, the State must only prove two elements: "the nature of the substance and the fact of possession by the defendant." *Staley*, 123 Wn.2d at 798. This area of the law is well-settled. *See Cleppe*, 96 Wn.2d 373; *Bradshaw*, 152 Wn.2d at 534, (refusing to overrule *Cleppe* and noting that in the 22 years "[s]ince *Cleppe* the legislature has amended [the drug possession statute] seven times and has not added a mens rea element to the mere possession statute").

"There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition" and our legislature has chosen to do just that with the simple drug possession statute. *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240 (1957); *State v. Rivas*, 126 Wn.2d 443, 452, 896 P.2d 57 (1995); *Cleppe*, 96

Wn.2d 373.[3] This decision does not run afoul of due process, and this court should decline, following controlling law from our Supreme Court, Mr. Buurman's invitation to employ its inherent authority to craft a *mens rea* element for possession of a controlled substance.

III. MR. BUURMAN WAIVED HIS VAGUENESS CHALLENGE TO THE INFORMATION BECAUSE HE DID NOT FILE A BILL OF PARTICULARS AT TRIAL.

Challenges to the sufficiency of a charging document are reviewed *de novo* and the general rule is that such a challenge may be raised for first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991); *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). When the defendant challenges the charging document for the first time on appeal, however, reviewing courts construe the document liberally in favor of validity. *State v. Lindsey*, 177 Wn.App. 233, 244-45, 311 P.3d 61 (2013); *State v. Tandecki,* 153 Wn.2d 842, 848-49, 109 P.3d 398 (2005).

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[3] Mr. Buurman directly states that "Washington's possession law violates due process," citing *U.S. v. Macias*, 740 F.3d 96 (2nd Cir. 2014). Br. of App. at 15. *Macias*, however, addresses whether a defendant convicted of being found in the United States as a previously-deported alien was actually "found in" the United States, it does not address Washington law, RCW 69.50.4013, drug possession, due process, or strict liability crimes. 740 F.3d 96-102. The concurring opinion of one judge discusses strict liability crimes and finds an implicit *mens rea* requiring proof of voluntary presence in the United States for the crime charged. *Id.* at 102-08. This holding does not directly support the conclusion that Washington's possession law violates due process and cannot be authority for said proposition.

When a defendant is charged with a crime, the information must allege (1) every element of the charged offense and (2) particular facts supporting them. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (citing *State v. Leach*, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). The purpose of this well-settled rule is to provide the defendant notice of the nature of the charge so that he or she is able to prepare a defense. *State v. Zillyette*, 173 Wn.2d 784, 785-86, 270 P.2d 589 (2012); *Tandecki,* 153 Wn.2d. at 846.

The requirement that the charging document alleges facts supporting the elements of the crime charged, however, "does not impose any additional requirement that the State allege facts beyond those that sufficiently support the elements of the crime charged or that the State describe the facts with great specificity." *Winings*, 126 Wn.App at 85. Thus, a "failure to allege specific facts in an information may render the charging document vague, but . . . not constitutionally defective." *State v. Laramie*, 141 Wn.App 332, 340, 169 P.3d 859 (2007) (citation omitted).

Contrary to the general rule that defendant may challenge a charging document for the first time on appeal, when a defendant complains that the charging document is vague rather than that the essential elements of the crime are missing, he or she has waived the

challenge if "no bill of particulars was requested at trial." *Leach*, 113 Wn.2d at 687 (holding "[a] defendant may not challenge a charging document for 'vagueness' on appeal if no bill of particulars was requested at trial") (citing *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985); *State v. Bonds*, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982)).

Here, the information charged Mr. Buurman with Theft in the Third Degree as follows:

> COUNT 02 - THEFT IN THE THIRD DEGREE 9A.56.020(1)(a) /9A.56.050/9A.56.050(1)(a)
> That he, TODD ANTHONY BUURMAN, in the County of Clark, State of Washington, on or about June 30, 2014, did wrongfully obtain or exert unauthorized control over the property or services of another, of a value less than $750, with intent to deprive that person of such property or services, to-wit: various items belonging to Safeway; contrary to Revised Code of Washington 9A.56.050(1)(a) and 9A.56.020(1)(a).

CP 1. Mr. Buurman concedes that the information "charges in the language of the statute, and thus contains the elements of the offense intended to be charged." Br. of App. at 18 (internal quotation omitted). Mr. Buurman complains, instead, that the facts contained in the information are "too vague and indefinite upon which to deprive [him] of his liberty." Br. of App. at 19. Because Mr. Buurman did not request a bill of particulars at trial, he may not now "challenge [the] charging document for 'vagueness' on appeal." *Leach*, 113 Wn.2d at 687; RP 7-122.

Consequently, this court should decline to review his challenge to the charging document.

IV. THE STATE CONCEDES THAT THE COURT ERRED IN ORDERING MR. BUURMAN TO PAY THE VICTIM PENALTY ASSESSMENT TWICE.

RCW 7.68.035 provides:

> When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and *shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor* and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

(emphasis added).

Here, Mr. Buurman was convicted of one felony and one gross misdemeanor pursuant to a single case or cause of action. CP 61, 74. On Mr. Buurman's Felony Judgment and Sentence the trial court clearly orders Mr. Buurman to pay the $500 victim assessment. CP 65. On Mr. Buurman's Misdemeanor Judgment and Sentence the trial court checked the box "See companion felony order for financial obligations," but nonetheless, and inconsistent with said checked box, wrote in $500 as the victim assessment penalty. If writing in the $500 amount superseded the checked box, which directed that the Felony Judgment and Sentence

contain the legal financial obligations for the case, then this amounted to an error in violation of RCW 7.68.035 and this court should vacate the additional $500 victim assessment on the Misdemeanor Judgment and Sentence.

D. CONCLUSION

For the reasons argued above, Mr. Buurman's convictions should be affirmed and the trial court's order requiring Mr. Buurman to pay a $500 victim assessment as part of his Misdemeanor Judgment and Sentence should be vacated.

DATED this 5 day of March, 2015.

Respectfully submitted:

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